

<div>Page 1</div> <div>VOLUME: I PAGES: 1-114 EXHIBITS: See Index</div> <div>UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION CASE NO. 1:08 CV 2755 JUDGE: LESLEY WELLS MAGISTRATE JUDGE: GREG WHITE</div> <div>HODELL-NATCO INDUSTRIES, INC. Plaintiff V. SAP AMERICA, INC., ET AL., Defendants</div> <div>DEPOSITION OF GILBERT W. KENNEDY July 16, 2014 - 10:20 a.m. REGUS CENTER 8 Hall Marketplace Boston, Massachusetts 02109 * * * * * ---- Lisa Marie Phipps, RPR/CSR ---- NextGenReporting 999 Old Eagle School Road Wayne, Pennsylvania 19087 215.494.7650</div>	<div>Page 3</div> <div>I N D E X</div> <div>Testimony of Gilbert W. Kennedy Examination by Mr. Star</div> <div>Page 5</div> <div>E X H I B I T S</div> <div><table><tr><th>No.</th><th>Description</th><th>Page</th></tr><tr><td>1</td><td>Expert Report and Disclosure of G. William Kennedy, PhD, CPA/ABV Managing Director FTI Consulting, Inc.</td><td>4</td></tr><tr><td>2</td><td>Declaration of G. William Kennedy, PhD, CPA/ABV</td><td>4</td></tr><tr><td>3</td><td>Hodell-Natco Statements of Income</td><td>71</td></tr><tr><td>4</td><td>Summary of Financial Information</td><td>80</td></tr></table></div>	No.	Description	Page	1	Expert Report and Disclosure of G. William Kennedy, PhD, CPA/ABV Managing Director FTI Consulting, Inc.	4	2	Declaration of G. William Kennedy, PhD, CPA/ABV	4	3	Hodell-Natco Statements of Income	71	4	Summary of Financial Information	80
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<div>Page 2</div> <div>APPEARANCES OF COUNSEL:</div> <div>For the Plaintiff: KOEHLER NEAL LLC (BY: P. Wesley Lambert, Esquire) 3330 Erieview Tower 1301 East Ninth Street Cleveland, Ohio 44114 216.539.9379 wlambert@koehlerneal.com</div> <div>For the Defendants(Via Video Stream): DRINKER BIDDLE & REATH LLP (BY: Gregory J. Star, Esquire) One Logan Square - Suite 2000 Philadelphia, Pennsylvania 19103 215.998.2734 gregory.star@dbr.com</div> <div>ALSO PRESENT: Jenna LaBrecque, Streaming Video Technician Steve Silverberg (Via Video Stream)</div>	<div>Page 4</div> <div>1 P R O C E E D I N G S 2 (Exhibit Nos. 1-2 premarked.) 3 S T R E A M I N G V I D E O T E C H N I C I A N: My name 4 is Jenna LaBrecque. I am here on behalf of 5 NextGen Reporting located at 999 Old Eagle 6 School Road, Wayne, Pennsylvania, 19087. 7 This deposition is being taken on 8 7/16/2014 at Regus, 8 Faneuil Hall 9 Marketplace, third floor, Boston, Mass, 02109. 10 It is being taken in the matter of 11 Hodell-Natco Industries, Incorporated, versus 12 SAP America, Incorporated. 13 Present for taking of this video 14 deposition is the witness, G. William Kennedy. 15 Would counsel please introduce themselves for 16 the record. 17 MR. LAMBERT: Wes Lambert here in 18 Boston representing Hodell-Natco. 19 MR. STAR: Greg Star from Drinker 20 Biddle & Reath, Philadelphia representing SAP 21 America and SAP AG. 22 And I would just put on the record 23 that counsel for the other co-defendant, 24 LSI/IBIS, has filed a petition for withdrawal 25 and neither I nor anybody else received any</div>															

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1 Q. What do you mean by "regression analysis"?
2 Break that down in layman's terms.
3 A. They were looking at relationships of various
4 purchasing manager indices and other
5 government statistics such as that. That's as
6 specific that I recall. I think there were
7 some other analysis that I was challenging the
8 staff on their direction.
9 Q. Was there ever any consideration of making a
10 calculation of damages based on increased
11 operational costs or calculation of lost
12 savings?
13 A. Not the lost savings that I can recall. I
14 mean, in my view the operational cost is a
15 component of the lost profits calculations
16 that I've done.
17 Q. And other than the regression analysis is
18 there anything else specifically that you can
19 recall that was considered as a methodology or
20 possible theory that was worked on by FTI and
21 then rejected, unfavorable, to being the
22 actual report?
23 A. I didn't catch the last part of the question,
24 I'm sorry.
25 Q. Sure. I'll say it again. Other than the

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1 regression analysis, is there any other
2 methodology or theory of damages that you
3 recall being considered at FTI and then not
4 being included in the final report?
5 A. I am not recalling anything specific, but I
6 can tell you I was pretty tough on the staff
7 in terms of really making sure that the
8 analysis was a tight one.
9 Q. So when you say that Hodell suffered actual
10 lost profits because it should have been able
11 to ship 4.2 million additional pounds of
12 product during the damages period than what it
13 actually shipped, what you are actually saying
14 is, or at least assuming, is that Hodell lost
15 opportunities to ship that additional amount
16 of product, correct?
17 A. It's a way to quantify using the
18 before-and-after method, which is the standard
19 acceptable method in my profession for
20 calculating lost profits.
21 Based on actual data, and not
22 conjecture, a comparison of the productivity
23 in a five-year period prior to the
24 installation of the package and during the
25 two-year period when the package was

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1 functioning.
2 Q. I don't mean to be disrespectful, but I don't
3 think that that responded to my question.
4 A. I apologize if it didn't.
5 Q. In lieu of having the -- it is all right. In
6 lieu of having the court reporter read it
7 back, I will try again.
8 We can agree that you are saying
9 that Hodell had the capacity and, therefore,
10 should have been able during the damages
11 period to ship 4.2 million pounds of
12 additional product than what it actually
13 shipped, correct?
14 A. Correct.
15 Q. Okay. And to go from that calculation of what
16 their capacity was or should have been and
17 translate that into an actual lost profits
18 calculation, there's an assumption in between
19 it, right, and the assumption has to be that
20 Hodell had customers that would have ordered
21 that additional product, right?
22 A. The before-and-after method, before-and-after
23 approach, that I have taken was looking at the
24 difference in the productivities in
25 quantifying the financial impact of lost

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1 profits of that difference in productivity.
2 I wouldn't agree with you that I
3 could specifically point out another
4 \$4.2 million worth of orders that were
5 cancelled.
6 And I apologize if I'm not answering
7 your question, but that is how I understand
8 it.
9 Q. Well, my question, to be very fair, sir, did
10 not use the word cancel. I didn't say
11 anything about cancelled orders.
12 I asked you whether there was an
13 assumption that was made by you that allows
14 you to take yourself from the calculation,
15 say, that, hey, Hodell on the one hand had the
16 capacity during the damages period to ship out
17 another 4.2 million pounds of product and it
18 should have shipped that out; and had it
19 shipped it out it would have translated into
20 the lost profits figure that you came up with.
21 My question to you, sir, is in
22 between those two calculations you would agree
23 with me that there is an assumption that in
24 order to translate the lost profits there must
25 have been customers out there at least willing

<p style="text-align: right;">Page 49</p> <p>1 assumption; that there is a customer ready, 2 willing, and able to pay for this product, 3 doesn't that render your opinion completely 4 speculative? 5 A. Not at all. My opinion was based on the 6 actual facts during the pre-damage period and 7 during the damage period both. 8 It was very robust and supported by 9 information the company maintained in the 10 ordinary course of business. 11 Q. Well, let's look on your specific opinion. Go 12 to Page 12 for me and the last full paragraph. 13 You say, quote -- you calculated, 14 quote, an incremental 4.2 million pounds of 15 product would have been shipped, which, if 16 shipped, would have resulted in a lost revenue 17 of around \$9 million and lost profits of 18 3.2 million during the damages period. 19 Sir, from your own statement, from 20 your own report, where you say -- where you 21 talk about product which, if shipped, you are 22 necessarily assuming that there were customers 23 who had placed orders and were going to have 24 product shipped to them during that damages 25 period, correct?</p>	<p style="text-align: right;">Page 51</p> <p>1 based on the facts of this case. 2 What I am trying to get at is 3 whether you made any assumption. I take it 4 from your testimony repeatedly here that you 5 made no assumption; you think none is 6 necessary. 7 But I point you now to this language 8 in your report, the "which is shipped" phrase 9 on Page 12. 10 And let me just get your 11 understanding. Your testimony to the jury in 12 this case would be that you are making no 13 assumption that there were customers to whom 14 that product would be shipped that were ready 15 to place orders and pay Hodell to receive 16 those products, right? 17 A. I can't answer that any differently than I've 18 answered it for, you know, probably 19 approaching a dozen times now. 20 Q. Okay. So you can't tell me to whom exactly 21 the 4.2 million pounds of products would have 22 been shipped and which customers would have 23 paid Hodell for that product, right? 24 A. That would never, ever be a part of a 25 before-and-after and a but-for world of</p>
<p style="text-align: right;">Page 50</p> <p>1 MR. LAMBERT: Objection. 2 A. That's not correct. This is a way to 3 phrase -- 4 Q. You are assuming that those products -- you 5 are assuming that those products would have 6 been shipped? 7 A. This, for the fifth or sixth time is a way to 8 quantify the impact of the drop in 9 efficiencies. 10 And I phrased it the way I've 11 phrased it to try to summarize and explain 12 what is in the details of the calculations; 13 that there was a material decline in the 14 productivity during the period we are calling 15 the damage period and this is a method of 16 quantifying the impact on profitability of the 17 business as a result of that. 18 Q. And I'll tell you again that I think your 19 answer is not responsive, and I'm not 20 questioning you on -- right now on the 21 methodology itself. I'm not looking at your 22 equation that you have put together, okay. 23 I am asking you about the factual 24 assumptions that leads you to believe that 25 your calculation of lost profits is reliable</p>	<p style="text-align: right;">Page 52</p> <p>1 quantification of lost profit damages. That's 2 never been the standard for accounting experts 3 to point to a customer that hung up the phone 4 or the customer that didn't call. 5 Q. Now, you can't even tell me which of Hodell's 6 specific products you believe would have been 7 shipped that would have made up this 4.2 8 million additional pounds of product, correct? 9 A. It wasn't something that I have any reason to 10 try to parse out. 11 Q. Okay. You are aware that Hodell has over 12 40,000 inventory items in its stock? 13 A. I believe I say that in my report. Yes, I am. 14 Q. Okay. You are aware that some products weigh 15 a lot but don't cost much while other products 16 don't weigh very much at all and cost more 17 than heavier products, correct? 18 A. I am. 19 Q. Okay. I mean, just so we are clear, we've got 20 this from folks at Hodell in prior testimony, 21 but, you know, Hodell stocks products that are 22 made of different types of metals; some metals 23 cost more but weigh less than others, right, 24 you aware of that through your site visit with 25 Kevin?</p>

<p style="text-align: right;">Page 57</p> <p>1 the sentence in terms of what I was intending</p> <p>2 to communicate or in describing the</p> <p>3 calculations that I performed.</p> <p>4 And, again, I am not sure where this</p> <p>5 leaves me in terms of what to do next so...</p> <p>6 MR. LAMBERT: Well, if he has a</p> <p>7 question that you can answer, then he can ask</p> <p>8 a question.</p> <p>9 Q. Sir, you agreed with me that the more</p> <p>10 appropriate word choice there should be could</p> <p>11 have been shipped, correct, you agree with</p> <p>12 that?</p> <p>13 A. If I think that better communicates to you</p> <p>14 what -- it's very clear to me what I have done</p> <p>15 and what I have said in my report.</p> <p>16 I am not hearing a difference in the</p> <p>17 two as it relates to the work that I have done</p> <p>18 or what I'm trying to communicate here.</p> <p>19 Q. Well, as I understand your testimony, you've</p> <p>20 actually just ignored completely the issue of</p> <p>21 whether there were customers willing and able</p> <p>22 to place orders, take shipment, and make</p> <p>23 payment and, therefore, made no analysis</p> <p>24 whether, in fact, 4.2 additional pounds of</p> <p>25 product would have been shipped over the</p>	<p style="text-align: right;">Page 59</p> <p>1 A. Again, I don't have a preference as to which</p> <p>2 of the two words if it better explains what I</p> <p>3 was trying to communicate. I am not hearing a</p> <p>4 difference in inserting one versus the other.</p> <p>5 I'm not sure how the protocols and</p> <p>6 the process works here. Not being a lawyer I</p> <p>7 am going to have to --</p> <p>8 Q. The protocol and process -- the process is</p> <p>9 that it is your report. In your report you've</p> <p>10 indicated that you have reserved the right to</p> <p>11 amend it.</p> <p>12 You say that on Page 6. I reserve</p> <p>13 the right to amend my report accordingly if</p> <p>14 new or additional information becomes</p> <p>15 available to you.</p> <p>16 A. (Witness reviewing document.)</p> <p>17 Q. I am asking you whether you agree based on</p> <p>18 your testimony that it is now appropriate for</p> <p>19 you to amend your report.</p> <p>20 MR. LAMBERT: Greg, you are putting</p> <p>21 words into his mouth as to what you are asking</p> <p>22 him to do.</p> <p>23 I don't understand why this has --</p> <p>24 what the point of this is. He has testified</p> <p>25 as to what he has testified about; his report</p>
<p style="text-align: right;">Page 58</p> <p>1 damages period, correct?</p> <p>2 A. That's right. I didn't try to identify the</p> <p>3 customer that didn't call or the customer that</p> <p>4 hung up, which is not part of a lost profits</p> <p>5 calculation.</p> <p>6 Q. You simply opined that Hodell had the capacity</p> <p>7 to make more shipment, correct?</p> <p>8 A. Correct. This is the impact of the</p> <p>9 profitability -- wait. The capacity is</p> <p>10 measured by the work force, labor, and the</p> <p>11 efficiency and the decrement in deficiency in</p> <p>12 that work force.</p> <p>13 Q. And, therefore, you calculated that Hodell</p> <p>14 could have shipped 4.2 million additional</p> <p>15 pounds of product and not offered any</p> <p>16 testimony that Hodell, in fact, would have had</p> <p>17 opportunities to make those shipments,</p> <p>18 correct?</p> <p>19 A. Yeah, I don't disagree with that.</p> <p>20 Q. So given that, just given what we've just gone</p> <p>21 over, and I will ask you again, are you still</p> <p>22 unwilling to right now take a pen and amend</p> <p>23 your report and change the word "would" to</p> <p>24 "could" so that it reads could have been</p> <p>25 shipped?</p>	<p style="text-align: right;">Page 60</p> <p>1 says what it says. That is why we are here.</p> <p>2 What is the point of all of this?</p> <p>3 Q. Sir, can you answer my question?</p> <p>4 A. As you pointed out on Page 6, my report says</p> <p>5 my opinion may be modified or supplemented</p> <p>6 based upon additional information may become</p> <p>7 available to me up to and during trial.</p> <p>8 This is just grammar and the</p> <p>9 difference, maybe, between an attorney's</p> <p>10 background and an accountant's.</p> <p>11 Could have been shipped -- it is an</p> <p>12 impact on the profitability. "Could have been</p> <p>13 shipped," "would have been shipped," to me are</p> <p>14 saying the same thing.</p> <p>15 Q. Well, we can agree that no product would have</p> <p>16 been shipped over the damages period by Hodell</p> <p>17 unless a customer was actually there ready,</p> <p>18 willing, and able to place an order, take the</p> <p>19 shipment and make payment, we can agree on</p> <p>20 that, right?</p> <p>21 A. Yes. I think that's back to the business</p> <p>22 fundamental questions we had earlier this</p> <p>23 morning.</p> <p>24 Q. Okay. So you do agree with me, yes?</p> <p>25 A. Yes, to the fundamental --</p>

<p style="text-align: right;">Page 69</p> <p>1 but wouldn't you agree that your calculation 2 also then overstates the potential harm that 3 Hodell suffered because unless you can show 4 that Hodell was going to take orders and 5 fulfill them and get paid by customers, there 6 could be no lost profits? 7 A. I disagree with that. 8 Q. So just so we are clear, your lost profits 9 calculation also includes increased overhead 10 costs? 11 A. I am not following that. 12 Q. Well, you say that your lost profits 13 calculation already, in part, as I understand 14 your testimony, covers the harm that Hodell 15 allegedly suffered from having workers who 16 were not working at peak efficiency. 17 In other words, in your view Hodell 18 was paying more workers or paying workers too 19 much to work at less than full capacity and 20 that's part of your lost profits calculation 21 already, right? 22 A. The lost profit calculation uses not 23 speculative but actual costs that were being 24 incurred by the company in each of the 25 period -- each of the months during the damage</p>	<p style="text-align: right;">Page 71</p> <p>1 statements of income. 2 (The stenographer hands 3 document to the witness and 4 Attorney Lambert.) 5 MR. STAR: Let's mark that Kennedy 6 3, please. 7 (Exhibit No. 3 marked.) 8 Q. Dr. Kennedy, the document marked Kennedy 3 is 9 -- these are documents that, unfortunately, 10 when they were copied the Bates label on the 11 bottom right-hand corner has gotten cut off. 12 These are documents, I will 13 represent to you, that were produced in this 14 case by Hodell. 15 They were not produced in the order 16 that I have given you. I have made sort of a 17 compendium exhibit here to provide you with 18 the statements of income for 2009, '10, '11, 19 and '12. 20 Are these documents that I have 21 handed you here that has been marked as 22 Exhibit 24 and now Kennedy 3 documents that 23 you have seen in the past and used in 24 preparing your opinions? 25 A. (Witness reviewing document.) I would have to</p>
<p style="text-align: right;">Page 70</p> <p>1 period. 2 I didn't set out to reduce those 3 costs and increase the margin in addition to 4 the calculations that I've made. 5 Q. Lets look at some of Hodell's financial 6 records that I believe you used, listed out in 7 your report, and you used for the basis for 8 the lost profits calculation. 9 MR. STAR: Lisa, we have marked 10 there a document that is deposition 11 Exhibit 24. Can you hand that to Dr. Kennedy, 12 please? 13 MR. LAMBERT: Can I have a copy? 14 Q. Do you have that, Dr. Kennedy? 15 A. I do, deposition Exhibit 24. 16 Q. Okay. This is a document that was marked in, 17 I think, Kevin Reidl's deposition -- pardon 18 me, Otto Reidl's deposition some years back. 19 These are documents produced by 20 Hodell. Could you just set that one to the 21 side for a moment. I want to hand you another 22 exhibit. 23 MR. STAR: Lisa, in one of the 24 folders, I think it is marked No. 5, there is 25 a three-page exhibit. It is Hodell-Natco</p>	<p style="text-align: right;">Page 72</p> <p>1 look at the Bates stamps compared to what I 2 have indicated in my report I had received and 3 reviewed. 4 I don't have a recollection of the 5 2011, 2012 income statements in the form that 6 they are presented, but I know that we had in 7 our file annual financial statements, the 8 reviewed financial statements for Hodell for a 9 sweep of years that may have encompassed 10 these. I am not sure. 11 Q. Okay. All right. Fair enough. And let's do 12 this -- 13 MR. LAMBERT: Greg, your audio is 14 cutting out significantly. I don't know if 15 NextGen is still on the line or not. 16 MR. STAR: All right. Lisa, go off 17 the record, please. 18 (Discussion off the record.) 19 Q. All right. So we had some technical problems 20 there and we lost each other for a few minutes 21 on the video and audio feed, but, Mr. Kennedy, 22 we are looking at Exhibit 24 and the document 23 marked as Kennedy 3. 24 And I understand you don't have a 25 specific recollection of whether you reviewed</p>

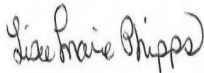
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1 CERTIFICATE
2 COMMONWEALTH OF MASSACHUSETTS
3 MIDDLESEX, SS.

4
5 I, Lisa Marie Phipps, Registered Professional
6 Reporter and Notary Public in and for the
7 Commonwealth of Massachusetts, hereby certify that
8 there came before me on the 16th day of July, 2014
9 the deponent herein, GILBERT W. KENNEDY, who was
10 duly sworn by me; that the ensuing examination upon
11 oath of the said deponent was reduced to
12 typewriting under my direction and control; and
13 that the within transcript is a true record of the
14 questions asked and answers given at said
15 deposition.

16 I FURTHER CERTIFY that I am neither attorney nor
17 counsel for, nor related to or employed by any of
18 the parties to the action in which this deposition
19 is taken; and, further, that I am not a relative or
20 employee of any attorney or financially interested
21 in the outcome of the action.

22 IN WITNESS WHEREOF, I have hereunto set my hand and
23 affixed my seal of office this 16th day of July,
24 2014.

25


Lisa Marie Phipps, RPR
Notary Public
Commonwealth
of Massachusetts
My Commission Expires:
April 17, 2020

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1 DEPONENT'S ERRATA SHEET & SIGNATURE

2 --- --- ---

3
4 The original of the errata sheet has been delivered
5 to R. Wesley Lambert, Esq. When the errata sheet
6 has been completed by the deponent and signed, a
7 copy thereof should be delivered to each party of
8 record and the original thereof delivered to
9 Gregory J. Star, Esq., to whom the original
10 deposition transcript was delivered.

11
12
13
14 INSTRUCTIONS TO DEPONENT

15
16 After reading this volume of your deposition,
17 indicate any corrections or changes on your
18 testimony and the reasons therefor on the errata
19 sheet supplied to you, and sign it.
20 DO NOT make any marks or notations on the
21 transcript volume itself.